

The Child's Right to a Clean and Safe Environment

Lord Brennan QC

David Wolfe

MATRIX

June 2004

Executive Summary

1. We have considered the extent and nature of a child's right to a clean (and “safe”) environment, with a particular focus on the legal implications of “hazardous” chemicals, namely those with the potential to cause harm (but which have not yet been demonstrated to actually cause harm).
2. Our assessment includes various international legal instruments, the constitutions of various EU and non EU countries, the ECHR, EU legislation, and the extent to which the UK court and ECtHR have upheld as lawful regulatory action taken against hazardous chemicals/processes by government departments (and other UK regulators), the EU Commission and the EU Member States. We have also considered the European Charter of Fundamental Rights which is likely to be incorporated into the new Constitutional Treaty for Europe
3. Overall, we conclude that at the international level the principled approach is that a child has the right to clean and safe environment; and that the protection extends to hazards as well as risk/harm.
4. That approach has been expressly adopted in various countries around the world.
5. Indeed the ECHR/HRA/ECFR provide for environmental protections which, so we consider, extend to protection from hazards as well as from risk/harm.
6. The EU has an established track record (most particularly in the waste management sector) of legislation which requires the avoidance of hazards as well as risks/harm.
7. In the UK, statutory protections in the workplace already seek to avoid and minimise hazards as well as risks/harm including by requiring substitution of hazardous substances by non-hazardous alternatives.
8. Regulatory action (by UK Government departments, by the EU Commission and by EU Member State governments) to ban products on a precautionary basis simply because they are hazardous has been upheld as lawful by the English court and the ECtHR.
9. Accordingly, the legal framework is thoroughly supportive of an approach which seeks to eliminate and/or reduce the exposure of people and the environment to hazardous chemicals. In some instances, such an approach is positively required.

Section 1: Introduction

10. We have been instructed to advise on the extent of a child's right to a clean and safe environment. Our particular focus is on the use of hazardous chemicals being those which have the potential to cause harm but which have not yet been shown to cause harm¹. This includes a number of uPvBs (very Persistent very Bio-accumulative Chemicals) and EDCs (Endocrine Disrupting Chemicals).
11. In the document, we summarise the relevant international and national legal provisions in operation and provide a substantive assessment of the rights arising from those instruments and their implications for regulators.

¹ The term hazard is used in the sense of the COSHH regulations (which regulate safety in the workplace). Hazard and risk are defined as follows:

"hazard", in relation to a substance, means the intrinsic property of that substance which has the potential to cause harm to the health of a person, and "hazardous" shall be construed accordingly;

"risk", in relation to the exposure of an employee to a substance hazardous to health, means the likelihood that the potential for harm to the health of a person will be attained under the conditions of use and exposure and also the extent of that harm;

Section 2: Introduction to the international and foreign legal instruments

INTERNATIONAL INSTRUMENTS

12. Articles 6 and 24 of the UN Convention on the rights of the Child confirm the right of the child to life and health respectively.
 - (1) Article 6: "Every child has the right to life, and *Governments should do everything they can to ensure the maximum survival and development of children*"
 - (2) Article 24: "Children have the right to the *highest attainable standard of health*"

The UK Government agreed to make all laws, policy and practice compatible with the Convention when it ratified it on 16 December 1991. All other EU member states have ratified the Convention.
13. The history of initial lack of control over various chemicals which were recognised as hazardous but not initially realised to be risky (because harm was not demonstrated at that stage) suggests that a Government seeking to do "everything it can to ensure the maximum survival and development of children" would logically need to prevent exposure to *hazardous* man-made chemicals, and not just those which were demonstrably harmful.
14. Article 12 of the International Covenant on Economic, Social and Cultural Rights states that:
 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the *healthy development of the child*;
 - (b) *The improvement of all aspects of environmental and industrial hygiene*;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness
15. Reaching the "highest attainable standard of physical ... health" plainly involves avoidance of hazards (Article 12(1)). We understand that a reduction in hazardous chemicals would contribute to a "reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child" (Article 12(2)(a)). We also note that, while the other legal instruments we have considered would benefit only children (and not the period pre-birth), Article 12(2)(a) also embraces environmental protections pre-birth.

16. The UNECE Aarhus Convention recognises our responsibility to protect the environment for future generations. Article 1 states that the objective of the Convention is to contribute to the protection “*of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*” on the basis of:

(1) Principle 1 of the Stockholm Declaration “*the common conviction that man has the fundamental right to....adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations....*”;

(2) Principle 10 of the Rio Declaration on Environment and Development “*At the national level, each individual shall have appropriate access to information concerning the environment...including information on hazardous materials...and the opportunity to participate in decision-making processes...*”.

Each of those provisions is reasonably to be read requiring avoidance of hazards, as well as avoidance of actual harm. The EU and all its 15 EU Member States are signatory to the Convention. Four Member States have ratified it (Belgium, Denmark, France and Italy), with more due to ratify it in 2003.

EUROPEAN CONVENTION OF HUMAN RIGHTS

17. Article 2 ECHR provides protection for the right to life. Article 8(1) ECHR provides qualified protection for the respect to right to family life.

18. Strasbourg case law makes clear that both Articles 2 and 8 ECHR include environmental protections.

19. In *Lopez Ostra v Spain* (1995) 20 EHRR 277, dealing with smells, noise and polluting fumes caused by a waste treatment plant, the ECtHR recognised that:

severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (at para. 51)

20. However, it is not clear whether the resulting doctrine (under Article 8) provides only for protection against actual pollution (i.e. harm/risk) or also against hazard (i.e. the potential for harm).

21. In particular, in *Asselbourg and Others v Luxemburg* Appeal No. 29121/95 dated 29th June 1999 the applicants were complaining of the polluting effects of producing steel from scrap rather than iron ore. Declaring the application inadmissible the court said this:

"It is only in wholly exceptional circumstances that the risk of a future violation may nevertheless confer the status of "victim" on an individual applicant, and only then if he or she produces reasonable and convincing evidence of the probability of the occurrence of a

violation concerning him or her personally: mere suspicions or conjectures are not enough in that respect.

In the instant case, the Court considers that the mere mention of the pollution risks inherent in the production of steel from scrap iron is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. They must be able to assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the consequences of the act complained of are not too remote...."

22. The decision of Sullivan J in *Vetterlein –v- Hampshire CC* [2001] EWHC Admin 560 suggests that the English court (the case has no bearing on what the ECtHR would say) may be slow to hold that Article 8 is engaged by something which is hazardous but not demonstrably risky. In particular, Sullivan J rejected the applicability of Article 8 on the basis that the claimant's concerns about potential health impacts from a proposed waste incinerator several kilometres away were "mere suspicions and conjectures" and a "generalised" (rather than "direct") concern.
23. However, in *McGinley and Egan v UK* (1999) 27 EHRR 1 the ECtHR considered the extent of the obligation on the Government to facilitate access to information under Article 8 thus (para 101):

Where a Government engages in hazardous activities ... which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

Plainly, in that case, the obligation was triggered by a mere hazard, namely the fact that the activities "might have hidden adverse consequences".
24. Under Article 2 ECHR, the Court has made the hazard/risk position reasonably clear. In particular, in *Oneryildiz v Turkey* [2002] ECHR 48939/99 the court was concerned with the state's failures in relation to environmental and safety conditions at a rubbish tip. Specifically, the state had not taken sufficient action following warnings that the rubbish tip might explode to prevent the hazard of explosion (which, in the event, had happened, causing deaths). At para 67, the ECtHR put the position in this way:

"... the Court's first task is to determine whether substantial grounds have been shown for believing that that the respondent State did not comply with its duty to take all necessary measures to prevent lives from being unnecessarily exposed to danger and, ultimately, from being lost."
25. It seems to us that a duty to avoid "exposure to danger" can be broadly equated with an obligation to avoid hazards.

THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS

26. In 2000, European Parliament, the Council of the European Union and the EU Commission approved The European Charter of Fundamental Rights (the ECFR). The ECFR does not, as such, provide legally enforceable rights at a domestic level of the kind we discuss here, although it

might be relied on to inform an understanding of an EU obligation². However, it appears likely that the ECFR will form part of the EU Constitutional Treaty which is presently under discussion. If so, its status may well change and it may become far more relevant and legally enforceable. The provisions it contains build on, among other things, the ECHR but with some notable differences.

27. Its Article 3(1) provides a “right to respect for .. physical integrity”; its Article 2 (like Art 2 ECHR), a right to life; and its Article 7 (like ECHR Article 8) a right to respect for private and family life and home. These would reinforce the protections against hazards which we have described above.
28. More interestingly (because they have no equivalents in the ECHR), its Article 24(1) specifically provides that “Children shall have the right to such protection as is necessary for their well-being” and its Article 37 provides that “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. These provisions show an ever-increased willingness at the EU level to provide clear and positive environmental protection and protection for children (including of an environmental kind). Without expressly referring to concepts such as “hazard”, they point, in our view, towards an emerging doctrine proscribing, for example, avoidable hazardous man-man chemicals.

THE CONSTITUTIONS OF OTHER STATES

29. Other international instruments and the constitutions of various States contain a right, equivalent to that of a right to a “clean” environment:
 - (1) There is a right to enjoy “*an environment suitable for the development of the person*” (Article 45(1) of the Spanish Constitution)
 - (2) “Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it” (Article 66 of the Portuguese Constitution)
 - (3) “Everyone has the right to an environment that is not harmful to their health or well-being” (Article 24(a) of the South African Constitution)
 - (4) “*All peoples shall have the right to a general satisfactory environment favourable to their development*” (Article 24 of the African Charter)
 - (5) “The state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature” (Article II, Section 16 of the Philippines Constitution; see also *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173)

² Note, for example, that its provisions are, by its Article 51, directed only to the institutions of the EU and to the Member States only when they are implementing Union law

- (6) *"Everyone shall have the right to live in a healthy environment"* (Article 11(1) of the 1988 San Salvador Protocol to the American Charter of Human Rights)
- (7) 1976 amendments to the Indian Constitution – Arts 48A, 51A(g) require the protection of the environment and led in the numerous M.C. MEHTA cases in the Supreme Court from 1986 onwards to judicial active intervention to enforce the Constitution

30. All of those are plainly supportive of, and consistent with, the elimination of hazards arising from man-made chemicals.

SECTION 3: OVERALL CONCLUSIONS ARISING FROM INTERNATIONAL LAW AND COMPARATIVE MATERIALS

31. From the above, it is clear that there is no explicit international law right of the child to a clean and safe environment. This use of the word “clean” (or “safe”) is unlikely to be used expressly in the relevant instruments. Nevertheless the terminology in fact used is consistent with the objective of a “clean/safe” environment. We consider that there is a strong argument that there is an implicit right of the child to a clean and safe environment within international human rights law.
32. A conduit for the right to a ‘clean/safe environment’ is provided through the rights to life and to health. The link between these ‘orthodox’ human rights and environmental rights has been illustrated by the International Court of Justice, in the *Gabcikovo-Nagymaros* case. Judge Weeramantry there held that:

‘the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous rights such as the right to health and the right to life itself’.³
33. In addition, and as explained above, the jurisprudence of the European Court on Human Rights suggests that a right to a clean environment can be advanced through the means of Article 2, which protects the right to life and Article 8, which protects private and family life.

A CLEAN ENVIRONMENT THROUGH THE RIGHT TO LIFE

34. As early as 1972, the Stockholm Declaration on Human Environment stated that:

“man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being”.⁴
35. The Preamble to the Declaration proclaims that

“[t]he environment is ‘essential to ... the enjoyment of basic human rights – even the right to life itself’”.

³ Case concerning the Construction of the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), (1998) 37 ILM 162, at 206.

⁴ Principle 1 of the Declaration of the United Nations Conference on Human Environment, UN Doc A/Conf./48.14/Rev.1 (1972).

36. The right to life has been invoked in the environmental cause in a number of jurisdictions. For example, the High Court of Rajasthan held in *Koolwal v State of Rajasthan* AIR 1988 Raj 2 that Article 21 of the Indian Constitution (the right to life) covers an act if it “adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created”. The reason for this invocation may be the conceptual similarity between the right to life and an environmental right.
37. Finally, as above, in the recent ECHR decision of *Oneryildiz v Turkey* [2002] ECHR 48939/99, the state’s negligence in relation to environmental and safety conditions at a rubbish tip was found to violate Article 2’s guarantee regarding the right to life, thus providing an express linkage between environmental hazard/risk and the right to life.

A CLEAN ENVIRONMENT THROUGH THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

38. As above, Article 24 of the CRC provides that “Children have the right to the “highest attainable standard of health” (“the right to health”) and that, per Article 24(2), “States parties shall pursue full implementation of this right and, in particular shall take appropriate measures...to combat disease, malnutrition...taking into consideration the dangers and risks of environmental pollution”. Most specifically, the Convention recognises the dangers and risks of environmental pollution (Article 24(2)(c)) in relation to the right to the highest attainable standard of health.
39. At a minimum, it is thus clear that the right to health cannot be disassociated from environmental considerations. Put more strongly, an ordinary reading of Article 24 indicates that a clean environment is instrumental to secure the benefit of health for children.
40. Article 24 is therefore directly relevant to our focus on the deleterious effects of chemicals, used and released into the environment every day, on the health of children. As such, Article 24 appears to show that children have a right to an environment that is not harmful to their health; and, as above, in our opinion, that freedom from harm can legitimately be said to include a freedom from relevant hazards.
41. This implicit right to a clean environment (or an environment that is not harmful to a child’s health) would necessarily be triggered through acts which pollute the environment (chemical trespass and contamination) and which thereby limit a child’s right to the “highest attainable standard of health”; or through acts which create equivalent hazards.
42. As noted above, an implicit right to a clean environment, based as it is on the right to health that is guaranteed for children under the CRC, has been rendered explicit in various domestic Constitutions.
43. The South African Constitution, as an example, provides in section 24 of the Bill of Rights that ‘*Everyone has the right – (a) to an environment that is not harmful to their health or well-being*’. The South African Constitution, it should be noted, contains a separate right to health care

(established by section 27 of the Bill of the Rights). That the Constitution created a discrete right to an environment that is not harmful to health indicates that the serious health consequences of air and water pollution are unarguably a component of environmental concerns.⁵

THE CONTENT OF THE RIGHT OF THE CHILD TO A CLEAN ENVIRONMENT

44. What will be clear is that the approach described above flows from the strategy that protecting a recipient's environmental rights is best done through the assertion of a claim based on existing human rights.⁶ At a minimum, the strategy suggests that an indirect substantive right of a child to a clean environment can be asserted under the CRC's guarantee of a child's right to life and right to health.
45. What, then, is the consequence of an argument which implies a right of a child to a clean environment under existing international human rights law? Put differently, what substantive content, if any, can be given to such an implicit right?
46. The substance of the right, we would think, is suggested by its purpose. The object of the right of a child to a clean environment, flowing as it does from other rights such as the right to life, the right to health, or the right to private life, is the *maintenance of an environment of a certain quality* – one which is not harmful to health or well-being, and which safeguards aspects of a worthwhile human life.
47. The difficult question to answer is to establish what the threshold of that quality is.
48. As above, we do not consider that the "serious harm" which was present on the facts of *Lopez Ostra* represents the floor of the level of protection. In particular, it goes without saying that an environment which seriously endangers the health of an individual would fall foul of the quality entailed by the notion of a "clean" environment. At the upper end of the quality scale, therefore, if epidemiological and toxicological evidence were to establish that the environment has been rendered detrimental to health or well-being, that would be sufficient to suggest that the right to a clean environment has been breached; particularly so in respect of the CRC, since that Convention specifically lays down that children "*have the right to the 'highest attainable standard of health'*" and that "*States parties shall pursue full implementation of this right and, in particular shall take appropriate measures...to combat disease, malnutrition...taking into consideration the dangers and risks of environmental pollution*".

⁵ See Jan Glazewski *Environmental Law in South Africa*, (2000), 85.

⁶ See more generally in this regard Malgosia Fitzmaurice 'The Right of the Child to a Clean Environment', (1999) 23 *Southern Illinois University Law Journal* 611 at 613. It is probably true to suggest that any claims that established human rights (such as the right to life and the right to health) provide the basis for further argument regarding an environmental right proceed from the assumption that dignity underpins all human rights. The right to an environment (claimed in this implicit manner) is therefore necessarily derived from the international human rights protection of dignity. See in this regard Fitzmaurice op cit 614.

49. Further implicit in court's observations in *Lopez Ostra* is a willingness on the part of the Court to protect environmental interests other than physical interests (the notion of 'well-being'). And, as noted above, we thus consider that the right to a clean environment would be infringed even though the environment has not been rendered toxic to humans – we consider that the protections would be engaged where hazards such as those contemplated here are identified.
50. Under the CRC, the right to a clean environment should therefore be sensibly understood to be an environment which has the capacity to provide this support, and an act which prejudices the capacity of the environment to support health or well-being would consequently violate the quality implicit in the notion of a clean environment. In the light of *Lopez Ostra*, similar arguments could undoubtedly be advanced under the ECHR in terms of Article 8.
51. As above, the fact that the trigger for the engagement of Article 8 in *Lopez Ostra* was "severe environmental pollution" does not mean that pollution at a lower level is not engaged. Moreover, as we explained above, there are strong arguments to suggest that Article 8 is engaged where the activity in question simply "may cause danger"; and that certainly seems to be the case in relation to Article 2 protections.
52. Aside from this observation, we would point out that, whether one is advancing the campaign for a clean environment under the CRC or the ECHR, the notion of "well-being" is open-ended and encompasses the essence of environmental concern, namely, a sense of environmental integrity – that we ought to utilise the environment in a morally responsible and ethical manner. As such, any interpretation of "well-being", and the level of pollution required to infringe that well-being under the CRC or ECHR, cannot be divorced from the fact that the campaign will be advanced by way of a child's right to a clean environment. The level of environmental pollution required to trigger a child's right to a clean environment (whether under the CRC or the ECHR) must therefore take account of the following:
- (1) That the right of a child to a clean environment conducive to well-being embraces a sense of stewardship.⁷ The result is that while severe pollution most obviously undermines that duty of stewardship, it is not simply a question of what the severity of the pollution is. Rather, any interpretation of well-being must consider that children, as vulnerable

⁷ See for example the Aarhus Convention in Article 1: "... the right of every person of present and future generations to live in an environment adequate to his or her health and well-being". The South African Constitution in section 24(b) similarly provides the right to "have the environment protected, for the benefit of present and future generations". See too the decision in *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173), which was based on a substantive procedural right to a clean environment in the Philippines Constitution. There the court established the concept of 'intergenerational equity' – which, put simply, requires present generations to "*pass the planet in no worse condition than it received it and to provide equitable access to its resources and benefits*". The Claim was brought by a number of minors and an NGO. The Supreme Court found for the Claimants on two grounds: the human right to a clean environment as enshrined in the Constitution and the concept of intergenerational equity. The principle of intergenerational equity has been confirmed by the International Court of Justice, per Judge Weeramantry, in the *Advisory Opinion on the Legality of the Treaty on Nuclear Weapons*, (1996) 36, ILM 809 at 888.

members of society,⁸ have a right to intergenerational equity. The correlative duty placed on the current generation (to hold the environment in trust for children) therefore ought not to be considered a light one. Soft law confirms this approach - see the World Declaration on the Survival, Protection and Development of Children, World Summit for Children 1990:

"We will work for common measures for the protection of the environment, at all levels, so that children can enjoy a safer and healthier future...There can be no task nobler than giving every child a better future."

- (2) Should the campaign be advanced under the CRC on the strength of an implicit right to a clean environment, it is worth noting that Article 6 provides that "*Every child has the right to life, and governments should do everything they can to ensure the maximum survival and development of their children*", and that Article 24 specifically lays down that children "*have the right to the 'highest attainable standard of health'*". It is difficult to conclude that these standards, which form the basis for a child's right to a clean environment, are breached only by "severe" pollution.

53. It is arguable therefore that a child's right to a clean environment would cover an environment free not only of toxic chemical waste (which could cause damage to health, for example), but could also be used to argue against the widespread chemical pollutants which undermine the quality of the environment to secure the 'maximum development' of children and the 'highest attainable standard of health' which they are entitled to.

CONCLUSION

54. Accordingly, in our opinion, there are good arguments to say that international law and, in particular the ECHR (which now takes effect in the UK by virtue of the Human Rights Act), recognise a right to a clean/safe environment.
55. Certainly, the growing trend is towards the recognition of such a right whether at the international or national level.
56. Moreover, in our opinion, that right extends to protection against hazards as well as well as actual risks/harm, particularly at the ECHR/HRA level.

⁸ The Preamble to the CRC recognises the vulnerability of children by providing that "*the child, by reason of his physical and mental immaturity, needs special safeguards...before as well as after birth*".

Section 4: Protections against hazards under EU law

LEGISLATION WHICH PROSCRIBES HAZARDS

57. In the context of potential EU action against certain hazardous chemicals, it is also worth noting two examples of EU Directives which have already involved action against hazards, as such..
58. First, Article 4 of the Waste Framework Directive (75/442/EEC) requires that:
"Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:
- without risk to water, air, soil and plants and animals,
- without causing a nuisance through noise or odours,
- without adversely affecting the countryside or places of special interest.
Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste."
59. On several occasions, the ECJ has stressed that Member States of the EU must take the necessary steps to ensure compliance with those obligations⁹.
60. However, the ECJ has not, as far as we are aware, directly analysed the precise substantive content of the obligations in question.
61. But, in our opinion, the language of the Directive is clear in proscribing methods of waste disposal which "endanger human health" or which "could harm the environment" by causing "risk to ...animals". It is plain to me that this is the language of hazard avoidance.
62. In a similar vein, Article 1 of the Incineration Directive (2000/76/EC) sets out the objective of that Directive thus:
"The aim of this Directive is to prevent or to limit as far as practicable negative effects on the environment, in particular, pollution by emissions into air, soil, surface water and groundwater, and the resulting risks to human health, from the incineration and co-incineration of waste."
63. The language of prevention of risk amounts to a proscription of hazards.
64. Accordingly, there is well established precedent for the EU acting – through legislation - against hazards (as well as risks).

⁹ See, for example, *Commission –v- Italy* [1999] I-7773 para 67, *Ministère public -v- Oscar Traen and Others* [1987] ECR I-2141 para

REGULATORY ACTION AGAINST HAZARDS WHICH HAS BEEN HELD TO BE LAWFUL

65. In addition, the ECJ has had to consider the legality of regulatory action taken by Member States and the EU Commission on a "precautionary basis" – generally being in the form of action against something which is identified as hazardous but in relation to which actual harm has not yet been formally demonstrated or quantified. Those considerations have often touched on the principles which underpin Community environmental policy. Article 174(2) EC identifies a number of principles upon which Community environmental policy is to be based. Included among these is the precautionary principle.
66. For example, in *Alpharma*¹⁰ the Court of First Instance (CFI) emphasized that the requirements of public health must take precedence over economic considerations,¹¹ and that the Community institutions may take protective measures without having to wait until the reality and seriousness of the relevant risks become fully apparent. It was on this basis that the Council succeeded in defending its decision to withdraw certain antibiotics from the list of additives, the incorporation of which in feed stuffs had been authorized by the Community. Similarly, and in a dramatically more high-profile setting, the European Court¹² upheld the validity of a Commission Decision adopting emergency measures to protect against BSE on the basis of reasoning which is thoroughly infused with the language of precaution:
- "Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks becomes fully apparent."¹³
67. Although the Court did not explicitly invoke the precautionary principle in that case¹⁴, it nonetheless endorsed the actions of the Commission as 'having displayed appropriate caution' pending completion of an overall examination of the situation.¹⁵

¹⁰ Case T-70/99R judgment of 30 June 2000.

¹¹ See also joined Cases T-125/96 & T-152/96, *Boehringer Ingelheim Vetmedica GmbH and Boehringer Sohn v. Council* (T-125/96) and *Commission* (T-152/96) [1999] ECR II- 3427, para 102.

¹² Case C-180/96 *United Kingdom and Northern Ireland v. Commission* [1996] ECR I-3903. See also Case C-157/56 *R v. MAFF ex parte the National Farmers' Union and Others* [1998] ECR I-2211.

¹³ para. 99.

¹⁴ See para. 100 in which it refers to the requirement that policy aim at a high level of protection, and to the principle that preventive action be taken and that environmental protection requirements should be integrated into the implementation of other Community policies.

¹⁵ para. 108.

68. From such cases it is clear that the European Court does not see the precautionary principle as limited to environmental matters, but sees it rather as applying also in the area of public health.¹⁶ This is a view shared by the European Council,¹⁷ and the Commission, which insists that one cannot conclude that the principle applies only to the environment, instead it

"...covers those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection."¹⁸

69. Member States have also relied on the precautionary principle to defend themselves against allegations that they have breached Community law (for example, free movement of goods law). This is illustrated by the response to the Danish prohibition on the marketing and use of creosote¹⁹ in which the Commission endorsed the national measures on the basis of the precautionary principle, and by virtue of their compliance with the concept of proportionality.²⁰ In the free movement of goods context, the judgment in *Toolex*²¹ involved the Court emphasizing the scientific uncertainty surrounding the threat posed to human health by the substance concerned, and concludes that 'taking account of the latest medical research on the subject, and also the difficulty in establishing the threshold above which exposure to trichloroethylene poses a serious risk to humans, given the present state of research, there is no evidence in this case to justify a conclusion by the Court that national legislation such as that at issue in the case in the main proceedings goes beyond what is necessary to achieve the objectives in view'.²² Again the principles of proportionality and precaution are inextricably bound up together in their application.

¹⁶ Also the Court of First Instance has recognised the use of the precautionary principle outside the field of the environment, see Case T-199/96, *Laboratoires pharmaceutiques Bergaderm SA and Goupil v. Commission* [1998] ECR II-2805, para 66, citing the ECJ ruling in the BSE case.

¹⁷ See para. B of the Council Resolution on the Precautionary Principle which emphasizes that the principle is also applicable to human health, as well as to the animal health and plant health sectors. It explicitly asks, in the subsequent paragraph, whether it might be useful to consolidate the principle in this respect, by amending the Treaty provisions concerning health and consumer protection.

¹⁸ COM(2000) 1 *Communication on the Use of the Precautionary Principle*, p10.

¹⁹ Commission Decision 1999/835/EC of 26 October 1999 OJ 1999 L329/82.

²⁰ See para. 110 for an explicit reference to the precautionary principle.

²¹ Case C-473/98 *Kemikalieinspektionen and Toolex*, judgment of 11 July 2000. See also the case C-2/90 *Commission v. Belgium* [1992] ECR I-4431, in which the Court had regard to the principle that environmental damage as a priority be rectified (remedied) at source in reaching the conclusion that domestic and 'foreign' (including from the other Belgian regions) waste are different and hence that differential treatment does not constitute discrimination, and hence that the mandatory requirement relating to environmental protection could be applied. Recourse to another of the Article 174 EC principles in this setting would tend to confirm their relevance in the context of free movement cases. That said the reasoning of the Court was rather unconvincing in this case; strained to say the least.

²² *Ibid.*, para. 45.

70. Relevant also to this analysis is the judgment of the Court in the *Greenpeace* GMO case²³ in which the court accepted that a Member State could not be obliged to give consent to the release of GMOs, 'if in the meantime it has new information which leads it to consider that the product for which notification has been received may constitute a risk to human health and the environment'. The use of the work "may" is, in our view, highly significant in legitimising regulatory action against a hazard which has not yet been identified to be a risk (i.e. to actually cause harm).
71. Accordingly, there is well established precedent for the EU acting against hazards (i.e potential risks), as well as actual risks whether that is through positive legislative action or through permitting the use of regulatory power.

²³ Case C-6/99 [2000] ECR I-1651.

Section 5: UK Provisions proscribing hazards

72. In a similar fashion, the UK parliament has already legislated against hazards, and the courts have upheld regulatory action (applying a "precautionary approach) against a product which was an identified hazard but for which there was no evidence of risk.
73. We shall describe these in turn.

THE CONTROL OF SUBSTANCES HAZARDOUS TO HEALTH REGULATIONS

74. As mentioned above, the Control of Substances Hazardous to Health (COSHH) Regulations offer various relevant definitions:

"hazard", in relation to a substance, means the intrinsic property of that substance which has the potential to cause harm to the health of a person, and "hazardous" shall be construed accordingly;

"risk", in relation to the exposure of an employee to a substance hazardous to health, means the likelihood that the potential for harm to the health of a person will be attained under the conditions of use and exposure and also the extent of that harm;

"substance" means a natural or artificial substance whether in solid or liquid form or in the form of a gas or vapour (including micro-organisms);

"substance hazardous to health" means a substance (including a preparation)-

(a) which is listed in Part I of the approved supply list as dangerous for supply within the meaning of the CHIP Regulations and for which an indication of danger specified for the substance is very toxic, toxic, harmful, corrosive or irritant;

(b) for which the Health and Safety Commission has approved a maximum exposure limit or an occupational exposure standard;

(c) which is a biological agent;

(d) which is dust of any kind, except dust which is a substance within paragraph (a) or (b) above, when present at a concentration in air equal to or greater than-

(i) 10 mg/m³, as a time-weighted average over an 8-hour period, of inhalable dust, or

(ii) 4 mg/m³, as a time-weighted average over an 8-hour period, of respirable dust;

(e) which, not being a substance falling within sub-paragraphs (a) to (d), because of its chemical or toxicological properties and the way it is used or is present at the workplace creates a risk to health;

"biological agent" means a micro-organism, cell culture, or human endoparasite, whether or not genetically modified, which may cause infection, allergy, toxicity or otherwise create a hazard to human health;

75. As we have already noted, the definitions of "hazard" and "risk" clearly distinguish between the potential for harm and the likelihood/effect of the harm. However, interestingly, the definition of "substance hazardous to health" focuses on substances which are "risks" as well as those which are "hazards". In particular, item (e) of the definition catches substances which merely "may create a hazard to human health".

76. This is of significance when one considers the substantive obligations under the regulations, and Regulation 7:

"(1) Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.

(2) In complying with his duty of prevention under paragraph (1), substitution shall by preference be undertaken, whereby the employer shall avoid, so far as is reasonably practicable, the use of a substance hazardous to health at the workplace by replacing it with a substance or process which, under the conditions of its use, either eliminates or reduces the risk to the health of his employees.

(3) Where it is not reasonably practicable to prevent exposure to a substance hazardous to health, the employer shall comply with his duty of control under paragraph (1) by applying protection measures appropriate to the activity and consistent with the risk assessment, including, in order of priority-

(a) the design and use of appropriate work processes, systems and engineering controls and the provision and use of suitable work equipment and materials;

(b) the control of exposure at source, including adequate ventilation systems and appropriate organisational measures; and

(c) where adequate control of exposure cannot be achieved by other means, the provision of suitable personal protective equipment in addition to the measures required by sub-paragraphs (a) and (b).

(4) The measures referred to in paragraph (3) shall include-

(a) arrangements for the safe handling, storage and transport of substances hazardous to health, and of waste containing such substances, at the workplace;

(b) the adoption of suitable maintenance procedures;

(c) reducing, to the minimum required for the work concerned-

(i) the number of employees subject to exposure,

(ii) the level and duration of exposure, and

(iii) the quantity of substances hazardous to health present at the workplace;

(d) the control of the working environment, including appropriate general ventilation; and

(e) appropriate hygiene measures including adequate washing facilities.

(5) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a carcinogen, the employer shall apply the following measures in addition to those required by paragraph (3)-

(a) totally enclosing the process and handling systems, unless this is not reasonably practicable;

(b) the prohibition of eating, drinking and smoking in areas that may be contaminated by carcinogens;

(c) cleaning floors, walls and other surfaces at regular intervals and whenever necessary;

(d) designating those areas and installations which may be contaminated by carcinogens and using suitable and sufficient warning signs; and

(e) storing, handling and disposing of carcinogens safely, including using closed and clearly labelled containers.

(6) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a biological agent, the employer shall apply the following measures in addition to those required by paragraph (3)-

- (a) displaying suitable and sufficient warning signs, including the biohazard sign shown in Part IV of Schedule 3;
- (b) specifying appropriate decontamination and disinfection procedures;
- (c) instituting means for the safe collection, storage and disposal of contaminated waste, including the use of secure and identifiable containers, after suitable treatment where appropriate;
- (d) testing, where it is necessary and technically possible, for the presence, outside the primary physical confinement, of biological agents used at work;
- (e) specifying procedures for working with, and transporting at the workplace, a biological agent or material that may contain such an agent;
- (f) where appropriate, making available effective vaccines for those employees who are not already immune to the biological agent to which they are exposed or are liable to be exposed;
- (g) instituting hygiene measures compatible with the aim of preventing or reducing the accidental transfer or release of a biological agent from the workplace, including-
 - (i) the provision of appropriate and adequate washing and toilet facilities, and
 - (ii) where appropriate, the prohibition of eating, drinking, smoking and the application of cosmetics in working areas where there is a risk of contamination by biological agents; and
- (h) where there are human patients or animals which are, or are suspected of being, infected with a Group 3 or 4 biological agent, the employer shall select the most suitable control and containment measures from those listed in Part II of Schedule 3 with a view to controlling adequately the risk of infection.

77. Thus, the COSHH regime is one of prevention of both risks and hazards if this is reasonably practicable including by use of an alternative substance; and that, if such prevention is not possible, steps must be taken to reduce exposure, including, in relation to biological agents, exposure to hazards.
78. Accordingly, employees in the workplace are already protected by a regime which requires non-hazardous substances to be used as an alternative to hazardous ones; and, where avoidance (through substitution or otherwise) is not possible, it requires reduction of exposures.
79. That may well provide a model for a similar approach to be extended beyond the workplace.
80. Indeed, it seems only a small step to extend similar protections to children in the community by controls on the use of hazardous man-made chemicals, particularly where non-hazardous alternatives are available.

REGULATORY ACTION TAKEN ON A PRECAUTIONARY BASIS

81. Indeed, the notion that action can be taken to proscribe particular products simply because they are hazardous (i.e. even in the absence of demonstrable harm/risk) is well established.
82. Such regulatory action was scrutinised by the English High Court in *Amvac –v- Secretary of State for the Environment Food and Rural Affairs* [2001] Admin 1011. The Secretary of State had used his regulatory powers to ban a chemical used in domestic fly control products. He did so simply on the basis that it was a hazard and without evidence of risk/harm. He expressly did so on a "precautionary" basis. The challenge to that action by the product's manufacturer failed: the High Court upheld the legality of the Secretary of State's approach.

Section 6: Overall Conclusion

83. Overall, we thus conclude that:
- (1) at the international level the principled approach is that a child has the right to clean environment; and that the protection extends to hazards as well as risk/harm;
 - (2) that approach has been expressly adopted in various countries around the world;
 - (3) indeed the ECHR/HRA/ECFR provides for environmental protections which, so we consider, extend to protection from hazards as well as from risk/harm;
 - (4) The EU has an established track record (most particularly in the waste management sector) of legislation which requires the avoidance of hazards as well as risks/harm;
 - (5) In the UK, statutory protections in the workplace already seek to avoid and minimise hazards as well as risks/harm including by requiring substitution of hazardous substances by non-hazardous alternatives; and
 - (6) Regulatory action (by UK Government departments, by the EU Commission and by EU Member State governments) to ban products on a precautionary basis simply because they are hazardous has been upheld as lawful by the English court and the ECtHR.
84. Accordingly, the legal framework is thoroughly supportive of an approach which seeks to eliminate and/or reduce the exposure of people and the environment to hazardous chemicals. In some instances, such an approach is positively required.

Lord Brennan QC
David Wolfe
MATRIX
12th June 2003